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In The

Supreme Court of the United States

OCTOBER TERM, 1940

No. 996

THE WOMEN'S CATHOLIC ORDER OF FORESTERS

Appellant Below,

vs.

THE CITY OF ENNIS, TEXAS, J. P. CLARK, R. R. THOMAS, J. N. GOODWIN, Commissioners, and E. C. HAWKINS, Treasurer, of Said City

Appellees Below.

Petition for Writ of Certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, New Orleans, La., and Brief in Support Thereof

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INDEX TO PETITION

I. Summary Statement of the Matter Involved 3
II. Jurisdictional Statement 9
III. Questions Presented and Reasons Relied on for the Allowance of the Writ 10
IV. Cases Relied on to Sustain Consideration of the Writ 18

INDEX TO BRIEF

I. Holdings of District and Circuit Court 20
II. Statutory Jurisdiction 21
III. Statement of the Case 23
IV. Specifications of Error 23
V. Summary of the Argument 25

TABLE OF STATUTES CITED

Bankruptcy Act, Chapter IX, Sec. 78-80, 11 U. S. C. A. 301, 48 Statutes 798 ..... 10, 21, 23, 27
Bankruptcy Act, Chapter IX, Sec. 81-84, 11 U. S.C.A. 401, 50 Statutes 653, 52 Statutes 939 ..... 10, 22, 23, 25, 27
Constitution of Texas, Art. XI, Sections 5 and 6 ..... 18, 43, 45
Constitution of United States, Fifth and Fourteenth Amendments 12, 16
Constitution of United States, Art. I, Par. 10 28
Judicial Code 240, Title 28, Sec. 347 ..... 9, 21
Judicial Code 57, Title 28, Sec. 118, U.S.C.A. 10, 14, 24, 39
Supreme Court Rule No. 5 and 24-C 4
Supreme Court Rule No. 4 and 24-C 15-41
Supreme Court Rule No. 38 ..... 9, 21
Revised Civil Statutes, State of Texas, Art. 707 ..... 16, 18, 29, 43, 45

TABLE OF STATUTES CITED (Cont.)

Revised Civil Statutes, State of Texas, Art. 826 18
Revised Civil Statutes, State of Texas, Art. 839 ..... 16, 18, 39, 43, 45
Revised Civil Statutes, State of Texas, Art. 1015 ..... 17, 29, 43

TABLE OF CASES CITED

Ashton vs. Cameron Co. Water Imp. Dist. No. 1, 298 U.S. 541; 56 S. Ct. 901 ..... 12, 21, 27
Austin vs. Cahill, 99 Tex. 175; 88 S.W. 542 ..... 12, 15, 27, 41
Ayer vs. Kemper, 48 Fed. (2d) 11 ..... 12, 28, 31
Baum vs. Coty, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531 ..... 18, 23
Beck vs. Otero Irri. Dist., 50 Fed. (2d) 951-5 (Colo.) 12
Bickford vs. Fed. Res. Bank, 5 Fed. Sup. 875 31
Blaylock vs. Small, 127 U.S. 96-104 28
Board of Liquidation of La. vs. McComb, 92 U.S. 531, 23 L. Ed. 625 17-43
Bogart vs. So. Pac. Ry. Co., 228 U.S. 138, 33 S. Ct. 497, 57 L. Ed. 768 12
Brooklyn vs. Insurance Co., 99 U.S. 368, 370, 25 L. Ed. 416 ..... 12, 48, 28, 39, 40
Brown vs. Crawford, 252 Fed. 248 ..... 12, 14, 40
C. B. & Q. Ry. Co. vs. Chicago, 166 U.S. 226, 235, 17 S. Ct. 581, 584; 41 L. Ed. 979 ..... 12, 29
Chase Nat'l Bank vs. City of Norwalk, 291 U.S. 431, 54 S. Ct. 475 ..... 14, 40
Chicot Drainage Dist. vs. Baxter State Bank, 308 U.S. 376, 60 S. Ct. 317 ..... 13, 26, 27, 37
City of Alvarado vs. Christian, 100 Fed. (2d) 156 42
City of Aransas Pass et al vs. Keeling, 113 Tex. 339, 247 S. W. 818, 821 ..... 18, 45

City of Waco vs. Mann, 127 S.W. (2d) 879 ..... 18, 38, 45, 46
Compton vs. Jessup, 68 Fed. 263 ..... 12, 14, 28, 31, 40
Conn vs. Penn, 18 U.S. 424, 5 Wheaton 426 32
Cooper vs. Reynolds, 10 Wall 308, 77 U.S. 308 ..... 12, 28
Denver-Greeley Irr. Dist. vs. McNeil, 80 Fed. (2d) 929 ..... 14, 39
Empire vs. Darlington, 101 U.S. 87 ..... 12, 28
Forsyth vs. Hammond, 166 U.S. 506, 17 S. Ct. 665, 41 L. Ed. 1095 18-22
Galena vs. Amy, 5 Wall 705, 18 L. Ed. 560 ..... 17, 43
Georgetown vs. Alexander Coal Co., 37 U.S. 91, 9 L. Ed. 1012 31
Hamer vs. N.Y. Ry. Co., 244 U.S. 266, 37 S. Ct. 511, 61 L. Ed. 1125 ..... 12, 28, 31
Hamilton Brown Shoe Co. vs. Wolf Bros. & Co., 204 U.S. 251, 60 L. Ed. 629, 36 S. Ct. 269 ..... 18, 23
Hansberry vs. Lee, 311 U.S. 32, 61 S. Ct. 115 (8) 12, 29, 31
Harrigan vs. Pounds, 265 N.Y. Sup. 676 ..... 12, 14, 18, 28, 40
Hawley vs. Fairbanks, 108 U.S. 543, 2 S. Ct. 846 ..... 13, 37, 40, 45
Hidalgo Co. Imp. Dist. No. 1 vs. Morey, 74 Fed. (2d) 101 ..... 17, 43
Hodgson vs. Vroom, 266 Fed. 267 32
Hubben vs. City of S. Hutchinson, 64 Kan. 645, 68 Pac. 52 ..... 15, 40
Jenkins vs. Etzminger (Fla.) 135 So. 785 ..... 17, 43
Ladew vs. Tenn. Copper Co., 218 U.S. 358, 31 S. Ct. 81, 54 L. Ed. 1069 ..... 11, 25
Laurel Oil & Gas Co. vs. Morrison, 212 U. S. 291, 29 S. Ct. 394, 53 L. Ed. 517 26
Lincoln Co. vs. Lunning, 133 U.S. 530, 33 L. Ed. 766, 10 S. Ct. 363 ..... 14, 39
Mass. vs. Sullivan, 207 N.Y. Sup. 181 ..... 13, 14, 31, 40

Mitchell Co. vs. Bank, 91 Tex. 361, 43 S.W. 880-883 ..... 18, 45
Mobile vs. Watson, 116 U.S. 289, 6 S. Ct. 398, 29 L. Ed. 620 ..... 17, 28, 43
Morrison vs. Burnette, 154 Fed. 617 26
Murray vs. Charleston, 96 U.S. 436, 34 L. Ed. 760 28
Myllius vs. Smith, 53 W. Va. 173, 448 S.E. 542 32
Pana vs. Bowler, 107 U.S. 529, 2 S. Ct. 704 ..... 12, 14, 28, 40
Perez vs. Perez, 220 U.S. 224, 31 S. Ct. 412-414, 55 L. Ed. 443 ..... 15, 39
Perry Co., Ky., vs. Catholic Order of Foresters, 17 Fed. Sup. 316 ..... 11, 25
Robertson vs. Blaine Co., 90 Fed. 63, 47 L. R. A. 459 15
Rogers vs. City of Omaha, 82 Neb. 118, 117 N. W. 119 ..... 15, 40
Roseborough vs. Ansley, 35 O. St. 107 32
Rorick vs. Board of Com. Everglade Drainage Dist., 57 Fed. (2d) 1048 ..... 12, 17, 45
Schmidt vs. Gold Min. Co., 28 Ore. 9; 40 Pac. 46 32
Spencer vs. Patey, 243 Fed. 555 26
State vs. Muench, 217 Mo. 124, 117 S.W. 25 32
St. Clair vs. Cox, 106 U.S. 350-353, 1S. Ct. 354 ..... 12, 28
Supreme Council of Royal Arcanum vs. Hobart, 244 Fed. 385 26
Tex. & Pac. Ry. Co. vs. Johnson, 76 Tex. 432, 13 S.W. 463, 151 U.S. 102 ..... 14, 40
Toledo Newspaper Co. vs. U.S., 237 Fed. 986, 247 U.S. 402, 38 S. Ct. 560, 62 L. Ed. 1186 26
United Mutual Life Ins. Co. vs. Avon Park, Fla., 61 S. Ct. 157, 85 L. Ed. 112, decided 11-25-40 35
U. S. vs. Bekins, 304 U. S. 27, 58 S. Ct. 811 ..... 11, 25, 27
U. S. ex rel Von Hoffman vs. Quincy, 4 Wall 535, 18 L. Ed. 403 ..... 12, 17, 43

Wade vs. Travis Co., 174 U. S. 506, 19 S. Ct. 715, 43 L. Ed. 1080 ..... 18, 45
Wabash vs. Adelbert College, 208 U.S. 38-57, 32 L. Ed. 379, 28 S. Ct. 182 ..... 12, 28, 31, 28
Women's Catholic Order of Foresters vs. Arlington, 28 Fed. Sup. 663 ..... 11, 12, 14, 25, 29, 31
Women's Catholic Order of Foresters vs. City of Ennis, 116 Fed. (2d) 270 20

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Appellees Below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, La.

TO THE HONORABLE, THE CHIEF JUSTICE, CHARLES EVANS HUGHES, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Women's Catholic Order of Foresters, respectfully presents to this Court its petition for a Writ of Certiorari, addressed to the United States Circuit Court of Appeals for the Fifth Circuit, to review the judgment of said Court af-

firming the judgment of the District Court of the United States for the Northern District of Texas, sitting in Equity at Dallas, Texas, wherein the District Court held that a consent decree (effected by the plaintiffs, in the class suit of William J. Meredith, et al., vs. City of Ennis, Texas, in said Court, brought on the Equity, and not on the Bankruptcy side of the Court, accepting the Refunding Agreement entered into between The Brown-Crummer Investment Company, of which plaintiffs were officers, and the City of Ennis) purporting to effect a composition of the entire bonded indebtedness of said City, and appropriating the entire bond taxing power of the City to the payment of the refunding bonds issued pursuant to said Decree, was binding on your Petitioner, who was the owner of $25,000.00 unrefunded City of Ennis, Texas, Street Paving Bonds, Second Series, dated May 10, 1923, and who was neither a party plaintiff or a defendant in said Class Suit, was not served with any process therein, had no notice thereof except by publication, and did not consent thereto, or ever accept any of the benefits of said Decree; and although your Petitioner had a Judgment on certain of its past due bonds and coupons and sought herein through its Plea of Intervention its pro-rata share of revenues, accrued and to accrue, pursuant to the terms of its bonds and the authority pursuant to which they were issued the Court held it was entitled only to its pro-rata share of the revenues accrued and to accrue as provided in said refunding plan.

I

Summary Statement of the Matter Involved

On the 7th day of October, 1938, this Petitioner filed a complaint in the United States District Court for the Northern District of Texas, in which the City of Ennis and its officials were made Defendants, being Civil Action No. 10. It sought judgment on $6,000.00 past due principal and $7,189.59 past due interest coupons attached to its bonds, and prayed for writs to enforce the payment on account thereof out of funds on hand and the levy of a tax to pay its judgment, and future maturities on its bonds (Tr. p. 51). The City answered, setting up that Petitioner was precluded from recovering, on the grounds that its rights had been determined in a Class Action filed on the 12th day of March, 1936, in the same District Court by William J. Meredith et al vs. City of Ennis, Texas, et al, No. 3650-~~696~~ 225 in Equity; that this Petitioner was served with notice of said suit by Publication Notice (Tr. p. 5) and bound by the Decree rendered therein (Tr. p. 22) on the 23rd day of September, 1937; and that said Court in said Cause had exclusive jurisdiction to determine and adjudicate the validity of Plaintiff's claim.

At the hearing of said Cause, this Petitioner contended that it was not bound by the Equity Decree and that it could only be bound through Bankruptcy (Tr. p. 56). The Court gave to this Petitioner judgment in the sum of $13,023.98 upon its past due bonds and interest coupons, refusing to recog-

nize its collateral attack upon the Decree, and certified the judgment into Equity Cause No. 3650-906, styled William J. Meredith et al, Complainants, vs. City of Ennis, Texas, et al, Respondents, wherein this Plaintiff could participate in the funds set aside pursuant to the Decree in that Cause (Tr. p. 59 and 60) and reopened the Equity Cause, giving this Petitioner the right by direct attack to demonstrate to the Court that the Decree was improper, unfair and improvidently entered with regard to the levy, assessment and collection of taxes, and the refunding agreement therein approved, as the same affects Plaintiff (Tr. p. 61). The Court opened said Decree so that Plaintiff would not have to be bound by the Decree (Court's statement Tr. p. 54).

This Petitioner filed its Plea of Intervention in said Cause on May 19th, 1939 (Tr. p. 61) and served all of the attorneys of record pursuant to Supreme Court Rules 5 and 24-C. The Plea of Intervention, although contested, was allowed, and an order was entered showing that service was completed. On May 29th, 1939 (Tr. p. 62) an amendment was filed and service completed on March 5th, 1940 (Tr. p. 63). In its Plea of Intervention (Tr. p. 64-69) Intervener alleges it was not served with process, was not a party Plaintiff or Defendant to said Cause, but was forced to intervene in said Cause, as the Decree as entered dealt with and effects its rights to pledged tax levies to support its bonds, and appropriates monies derived from tax levies properly belonging to it, and makes a DIRECT ATTACK upon

said Judgment (Tr. p. 69-70-76) and says that the same is void insofar as it affects Petitioner's rights to participate to the full extent of the Trust Funds earmarked for its particular issue of bonds and to its share of the taxing power.

Intervener further alleges that the Decree in the Meredith suit (Tr. p. 22 et seq.) was a Consent Decree binding only consenting creditors and the City. The Brown-Crummer Investment Co. of Wichita, Kansas, was in fact the real Plaintiff in said cause, as the Plaintiffs, Wm. J. Meredith et al were all officials of said Company (Tr. p. 65), and admit in their Third Supplemental Bill of Complaint (Tr. p 9 & 10) that they had acquired and become the legal owners and holders of the total aggregate of bonds of said City in the sum of $423,000 (Tr. p. 35), validated in the Decree, and as Plaintiffs adopt the agreement and contract entered into by and between The Brown-Crummer Company and the City of Ennis, Texas, to refund all of it's indebtedness (Tr. p. 14). The pleading of the City in their Supplemental and Original Answer (Tr. p. 11-14) evidence the fact that this is a Consent Decree, and there ask the Court to retain jurisdiction, saving the rights of any and all persons not parties therein by representation. Intervener says it was not bound, as it was not a party to said agreed judgment, nor has it ever ratified or consented to the same.

Intervener further alleged that said Decree took, without it's consent, from the Interest and Sinking Fund Account (Tr. p. 76) the sum of $6,850.22,

which had accumulated from monies collected from prior tax levies and placed in a trust fund to pay $43,500.00 Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, of which this Petitioner held $25,000.00 in principal, and to which it was entitled $4,898.91, and left only $2,667.09 as its proportionate part of said fund, which in effect impairs the obligation of its contract and takes property without due process of law (Tr. p. 75-76).

This Petitioner further filed a Motion to Modify said Decree and made a DIRECT ATTACK upon the Decree (Tr. p. 91-96), alleging that it was improper, unfair and improvidently entered, and void as to it, as the Decree as entered makes no provision for the levy, assessment and collection of taxes for bonds owned and held, and not voluntarily exchanged for the refunding bonds authorized in said Decree, but utilizes the entire taxing power to pay the City's refunding bonds validated by said Decree.

The Respondent herein answered this Plea of Intervention (Tr. p. 79-90) and Motion to Modify said Decree (Tr. p. 96-100), pleading that in the Equity Decree entered on September 23rd, 1937, the Court specifically found that notice to absent parties was published and mailed in compliance with the Court's orders, and that this Petitioner was bound by said published notice; that after the entry of the Decree on February 24th, 1939, such judgment was certified into the Equity Cause; that this Petitioner having elected to come into said Cause and participate in the funds, was bound thereby and lost what-

ever rights it might have to attack the judgment; that said suit in Civil Action No. 10 upon which judgment was submitted, was filed more than one year after the entry of the Decree in the Meredith suit.

The case went to trial on March 7th, 1940, and the issues were joined. Intervener introduced evidence (Tr. p. 102) showing that although the sum of $6,850.22, which had accumulated from the direct levy of taxes to support Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, was taken and placed in a Special Fund, viz: $68,054.23, that there was now available to apply on its judgment only the sum of $2,667.09 (Tr. p. 106) after distribution through the Decree; that no specific levy of a tax had been made since the year of 1936 to pay Petitioner's bonds (Tr. p. 102). That there had been included in the refunding operation $25,000.00 Refunding Bonds, Series 1937-C, which have never been exchanged (Tr. p. 107), upon which there was an accumulation of $4,866.75, which should be properly applied to the payment of Petitioner's judgment. But although tax levies had been made in prior years to 1936 for Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, such delinquent taxes, when collected, had not been placed to the credit of the Interest and Sinking Fund Account of Intervener's bonds, but was placed in the General Fund (which Plaintiff prayed should be reimbursed and applied on the payment of its judgment.)

Petitioner further introduced evidence that there was $25,430.64 on hand March 1, 1937, in the Waterworks and Sewer Funds (Tr. p. 101), which was not taken into consideration or disbursed to creditors in the Decree, although the Charter provided (Tr. p. 105) for its use to pay Water and Sewer Bonds, of which there were $53,000.00 Water System Bonds dated August 15th, 1925; $29,000.00 Water and Sewer Bonds, dated January 10th, 1923, and $30,000.00 Sewer System Bonds dated September 15th, 1926; $39,000.00 Water and Sewer Bonds dated October 10th, 1923, making a total of $151,000.000 refunded and approved in the Decree (Tr. p. 21).

The trial was by the Court, which found that the Decree was a proper Class Action, and that this Petitioner was bound by publication notice and not entitled to recover as prayed; that more than a year had elapsed from the date of judgment until the time Plaintiff filed its original petition, and that the only way that it could receive taxing power or money was by accepting Refunding Bonds as authorized by the Decree, and denied Intervener's direct attack upon the Decree, both in the intervention and in its Motion to Modify the Decree.

Petitioner filed Assignments of Error (Tr. p. 115) and the case was duly appealed to the Circuit Court of Appeals for the Fifth Circuit, who affirmed the Trial Court's judgment.

The principal contentions sustained on appeal were that this Petitioner was bound by the Class

Action in Equity in the Federal Court; that the Court had jurisdiction in said cause to bind this Petitioner, even though it was not sitting as a Court of Bankruptcy. That Petitioner was barred by limitation from attacking said judgment by the one-year Statute of Limitation, and had failed to serve the Refunding Bondholders in its Plea of Intervention (Tr. p. 123).

II

JURISDICTIONAL STATEMENT

1.

The Statute believed to sustain the right of this Court to review by Writ of Certiorari, the judgment of the United States Circuit Court of Appeals, is that conferred by Title 28, Section 347 (Judicial Code 240, as amended), and Supreme Court Rule 38.

2.

The judgment appealed from was entered by the United States Circuit Court of Appeals on December 12th, 1940. Application for extension of time to file a Petition for Rehearing was granted to include January 15th, 1941. On January 15th, 1941, Petition for Rehearing was filed and was denied by the Circuit Court of Appeals on February 1st, 1941, as the same appears at pages 130 to 147 of the printed record herein.

3.

The application herein is from a judgment of

the United States District Court in a civil Cause in Equity, the nature of which is duly disclosed in the SUMMARY STATEMENT OF THE MATTER INVOLVED, and to review the judgment of the United States Circuit Court of Appeals, as the same appears on pages 123 to 128 of the printed record herein.

III

Questions Presented and Reasons Relied on for the Allowance of the Writ

(A) Original Jurisdiction having been conferred by Congress on Courts of Bankruptcy under Chapter IX, Sections 78, 80, 81, and 84 of the Bankruptcy Act, 11 U.S.C.A. 301 and 401 et seq, 48 Statutes 798, 50 Statutes 653, 52 Statutes 939, to effect a Composition of Municipal Debts of Taxing Agencies, this Petitioner here challenges the jurisdiction of the Federal Court, sitting in Equity, in a Class Action filed by William J. Meredith et al vs. City of Ennis, Texas, after the passage of the Bankruptcy Act, to render a decree binding this Petitioner, who was present only through Publication Notice, as provided by Sec. 57 of the Judicial Code, U.S.C.A., Sec. 118. The result of which suit is to enforce Petitioner to scale its debt.

This case presents the question as to whether a Federal Court in Equity has jurisdiction to effect a composition of municipal indebtedness without affording the bondholders the protection afford-

ed by the Municipal Bankruptcy Act. This is the first test of the validity of such a decree since the passage of the National Municipal Bankruptcy Act. The decision in this case is probably in conflict with the decision of this Court in the case of *United States vs. Bekins*, 304 U.S. 27, 58 S. Ct. 811, wherein the Court upholds the constitutionality and necessity for Municipal Bankruptcy Act, and in which it recognizes the conclusion of the Committee of Congress, that there is no Forum up to the time of the passage of said act in which taxing agencies might compromise their debts and force non-accepting bondholders to scale their debt. The holding in this case is also contra to the holding of the United States District Court for the Eastern District of Kentucky in *Perry County vs. Catholic Order of Foresters*, 17 Fed. Sup. 316. *Women's Catholic Order of Foresters vs. Arlington*, 28 Fed. Supp. 663. *Ladew vs. Tennessee Copper Co.*, 218 U.S. 358, 31 S. Ct. 81, 54 L. Ed. 1069.

(B) The effect of the holding by the Trial Court and the Circuit Court of Appeals that the case of *W. J. Meredith et al vs. City of Ennis, et al*, No. 3650-906, was a class action and is in all things right and binds this Petitioner, is contrary to the law and evidence, and is in conflict with the opinions of this Court, as it upholds the right of a Federal Court sitting in Equity in a class action, to permit one not in privity with it to stand for and bind it, a non-resident municipal bondholder not before the Court by actual service of process upon it, and force it to ac-

cept bonds of different maturities and different rates of interest, the effect of which is to take this Petitioner's property without due process of law, contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States:

Hansberry vs. Lee, 311 U.S. 32, 61 S. Ct. 115 (8), decided Nov. 12, 1940.

Chicago, B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226, 235; 17 S. Ct. 581, 584; 41 L. Ed. 979.

Brooklyn vs. Insurance Co., 99 U. S. 368, 370; 25 L. Ed. 416.

Cooper vs. Reynolds, 10 Wall 308; 77 U.S. 308.

Empire vs. Darlington, 101 U.S. 87.

St. Clair vs. Cox, 106 U.S. 350-353; 1 S. Ct. 354.

Pana vs. Bowler, 107 U.S. 529-545; 2 S. Ct. 704.

Hamer vs. New York Ry. Co., 244 U.S. 266; 61 L. Ed. 1125; 37 S. Ct. 511.

Beck vs. Otero Irri. Dist., 50 Fed. (2d) 951-5; (Colo.).

Wabash R. R. vs. Adelbert College, 208 U. S. 38-57; 32 L. Ed. 379; 28 S. Ct. 182.

Compton vs. Jessup, 68 Fed. 263.

Ayer vs. Kemper, 48 Fed. (2d) 11.

Harrigan vs. Pounds, 265 N. Y. Sup. 676.

Brown vs. Crawford, 252 Fed. 248.

Bogart vs. So. Pac. R. R., 228 U.S. 138, 33 S. Ct. 497; 57 L. Ed. 768.

Women's Catholic Order of Foresters vs. Arlington, 28 Fed. Sup. 663.

Austin vs. Cahill, 99 Tex. 175; 88 S.W. 542.

Wade vs. Travis Co., 174 U.S. 506; 43 L. Ed. 1080.

Rorick vs. Board of Com. Everglade Drainage Dist., 57 Fed. (2d) 1048; Sec. 3-4 (Fla.).

U. S. ex rel Von Hoffman vs. Quincy, 4 Wall 535; 18 L. Ed. 403.

Mass. vs. Sullivan, 207 N.Y. Sup. 181.
Hawley vs. Fairbanks, 108 U.S. 543, 2 S. Ct. 846.

(C) That the finding of the District Court and the affirming opinion of the Circuit Court of Appeals for the Fifth Circuit, that when this Petitioner elected to come into this Cause of Action and make a direct attack upon the judgment rendered therein, asserting that it was not bound by it, that it waived or released any rights it might have in Civil Action No. 10, to the levy of a tax to pay its bonds and its judgment obtained therein.

The decree in the Meredith case was collaterally attacked in Civil Action No. 10 and the Court opened the judgment in the Meredith suit (Tr. p. 52) so that this Petitioner might have its day in Court and come in and make a direct attack upon the judgment. The holding of both the District Court and the Circuit Court of Appeals, that this constituted a waiver of known rights of Petitioner to attack said judgment and obtain relief herein is contrary to the opinion of this Court as rendered in *Chicot Drainage District vs. Baxter State Bank*, 60 Sup. St. 317, 308 U. S. 371, which in effect holds that the jurisdiction of the Federal Court could be entertained in a direct review, but could not be assailed collaterally.

Hawley vs. Fairbanks, 108 U.S. 543; 2 S. Ct. 846.

(D) That the finding of the trial court and the affirmance by the Circuit Court of Appeals that

this Petitioner's Original Petition filed on Oct. 17th, 1938, and its Plea of Intervention filed in this Cause on May 19th, 1939, comes too late to modify the decree under Title 28, Sec. 118, of the U.S.C.A., Judicial Code 57, is not available to the city, and is contrary to the weight of authority and the holding of this Court, to the effect that a nonresident Municipal Bondholder cannot be bound by service through publication notice, unless he has voluntarily appeared and answered therein, and any such decree as to him is void. If he is not a party and not bound, then this Petitioner's contention does not come too late:

Chase Nat'l. Bank vs. City of Norwalk, 291 U.S. 431; 54 S. Ct. 475.
Brooklyn vs. Insurance Co., 99 U.S. 362-370.
Pana vs. Bowler, 107 U.S. 529; 2 S. Ct. 704.
Brown vs. Crawford, 252 Fed. 248.
Tex. & Pac. Ry. Co. vs. Johnson, 76 Tex. 432; 13 S.W. 463; 151 U.S. 102.
Women's Catholic Order vs. Arlington, 28 Fed. Sup. 663.
Harrigan vs. Pounds, 1933, 265 N.Y. Sup. 676.
Mass. vs. Sullivan, 207 N.Y. 181.
Compton vs. Jessup, 68 Fed. 263.

This defense is not available to the city and to permit it to plead the Statute of Limitation will permit it to take advantage of its own wrong;

Denver-Greeley Irri. Dist. vs. McNeil, 80 Fed. (2d) 929.
Lincoln vs. Luning, 133 U.S. 529; 33 L. Ed. 766; 10 S. Ct. 363;

Perez vs. Perez, 220 U.S. 224; 31 S. Ct. 412-414; 55 L. Ed. 443.

Robertson vs. Blaine Co., 90 Fed. 63, 47 L. R. A. 459.

Hubben vs. City of S. Hutchinson, 64 Kan. 645, 68 Pac. 52.

Rogers vs. City of Omaha, 82 Neb. 118, 117 N. W. 119.

(E) The finding of the trial court (Tr. 111) and the affirmance by the Circuit Court of Appeals that the Appellant failed to serve any of the parties in the Original Equity Decree save and except the City of Ennis is contrary to the evidence, and prior finding of the District Court (Tr. p. 62 and 61), which order recites that all parties had been served by notice, as provided by the Supreme Court Rules.

Federal Court Rules as adopted by this Court, Rules 4 and 24C.

Such holding is contrary to the holding of the Supreme Court of the State of Texas:

Austin vs. Cahill, 99 Tex. 175, 88 S.W. 542 (19) which holds:

> "That the holder of Refunding Bonds are not necessary parties in their own person, but are constructively present and represented through the city in a suit by the Original Bondholders to enforce the levy of a tax to pay original bonds not surrendered for refunding."

(F) The Petitioner herein assigned error in

the finding of the Trial Court, wherein it refused to require the City to reimburse the Interest and Sinking Fund Account of Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, to the extent of $4,898.91, which is this Intervenor's pro rata part of the $6,850.22 wrongfully taken out of the Interest and Sinking Fund Account of its bonds. At the time of the filing of said suit, Meredith had no bonds of the same issue as this Petitioner, and was not in the same class. Afterward he acquired $14,500.00 of these bonds (Tr. p. 27), and left only $2,667.09 to this Petitioner under the Consent Decree entered therein, the effect of which was to take earmarked trust funds which was this Petitioner's property, without due process of law and impaired the obligation of its pre-existing contract, which is contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, and contrary to Articles 707, 839 and 1015 of the Revised Civil Statutes of the State of Texas, which makes said fund a trust fund, which cannot be diverted, save and except to pay interest and redeem bonds at maturity:

> ART. 707: "When the issuance of bonds has been authorized, the governing body of a county or town shall provide for the levy and collection of a tax annually sufficient to pay the annual interest and provide a sinking fund for the payment of the bonds at maturity."
>
> ART. 839: "No city or county treasurer shall honor any draft upon the interest and sinking fund provided for any of the bonds of such city

or county, nor pay out nor divert any of the same, except for the purpose of paying the interest on such bonds or for redeeming the same, or for investment in such securities as may be provided by law."

ART. 1015: "To provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created——"

In the case of *Rorick vs. Board of Commissioners of Everglade Drainage District*, 57 Fed. (2d) 1048, Sec. 3 and 4, the Court holds:

"When the State authorizes the taxing subdivision to contract by issuing bonds and to exercise the power of local taxation to the extent necessary to meet such obligations, the power thus given cannot be withdrawn so long as its exercise is necessary to satisfy the vested rights of the bondholders. In such cases the power given becomes a trust which the owner cannot annul and which the donee is bound to execute."

Hidalgo Co. Rd. Dist. No. 1 *vs. Morey*, 74 Fed. (2d) 101.

U. S. ex rel Von Hoffman vs. Quincy, 4 Wall 535; 18 L. Ed. 403.

Board of Liquidation of La. vs. McComb, 92 U. S. 531; 23 L. Ed. 625.

Galena vs. Amy, 5 Wall 705; 18 L. Ed. 560.

Mobile vs. Watson, 116 U.S. 289; 6. S. Ct. 398; 29 L. Ed. 620.

Jenkins vs. Entzminger (Fla) 135 So. 785.

(G) The United States Circuit Court of Appeals erred in failing to sustain this Petitioner's As-

signment of Error (Tr. p. 116) to the finding of the District Court that the Meredith Decree utilized the entire taxing power for refunding bonds, and is conclusive against this Petitioner as to its share of the taxing power of the City of Ennis, Texas, to support its unrefunded bonds, as prayed for in its Petition of Intervention (Tr. p. 78 and 79). Such finding is contrary to the evidence, to the Decree (Tr. p. 37-38 and 39), Constitution and Statutes of the State of Texas, and holdings of this Court:

Revised Civil Statutes of Texas, Art. 707 and 826.

Texas Constitution, Art. XI, Sec. 5 and 6.

Hawley vs. Fairbanks, 108 U.S. 543; 2 S. Ct. 846.

Wade vs. Travis Co., 174 U.S. 506; 19 S. Ct. 715; 43 L. Ed. 1080.

City of Waco vs. Mann, 127 S.W. (2d) 879.

Mitchell Co. vs. Bank, 91 Tex. 361; 43 S.W. 880-883.

City of Aransas Pass vs. Keeling, 112 Tex. 339; 247 S.W. 818-821.

IV

The cases relied on to sustain the consideration of this writ are as follows:

Forsyth vs. Hammond, 166 U.S. 506, 41 L. Ed. 1095; 17 S. Ct. 665.

Hamilton Shoe Co. vs. Wolf Bros. & Co., 240 U. S. 251; 60 L. Ed. 629; 36 S. Ct. 269.

Baum vs. Coty, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

WHEREFORE, your Petitioner respectfully prays that Writ of Certiorari be issued out of and under the seal of this Honorable Court, and directed to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La., commanding that Court to certify and send to this Court for its review and determination, on a day certain, a full and complete Transcript of Record and the proceedings had in Cause No. 9585, Women's Catholic Order of Foresters, Appellant, vs. City of Ennis, Texas, et al, and that the Decree of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Honorable Court, and that your Petitioner have such other and further relief in the premises, as to this Honorable Court may seem meet and just.

Respectfully submitted,

Thomas Mason, 77 W. Washington,
Chicago, Ill.

Wm. E. Hall, Jr.,

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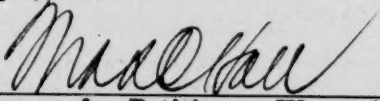
By 

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Kirby Bldg., Dallas, Texas.
Attorneys for Appellees.

In The

Supreme Court of the United States

No.....

THE WOMEN'S CATHOLIC ORDER OF FORESTERS,
Appellant Below,

vs.

THE CITY OF ENNIS, TEXAS, J. P. CLARK, R. R. THOMAS, J. N. GOODWIN, Commissioners, and E. C. HAWKINS, Treasurer, of Said City
Appellees Below.

OCTOBER TERM, 1940

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

-I-

The opinion of the United States District Court for the Northern District of Texas is copied at pages 109 and 113 of the Record, while the opinion of the United States Circuit Court of Appeals for the Fifth Circuit is set out in full at pages 123 and 128 of the Record, reported in 116 Federal (2d) 270.

-II-

(1) The date of the judgment to be reviewed is December 12th, 1940, while Petition for Rehearing was denied upon the 1st day of February, 1941 (Tr. p. 147).

(2) The statutory provision believed to sustain the jurisdiction of this Court is set forth under Title 28, Sec. 347, Judicial Code 240, Supreme Court Rule 38.

(3) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. p. 123) and the order denying Appellant's Motion for Rehearing (Tr. p. 147, Motion p. 130) sustains the jurisdiction of a Federal Court sitting in Equity, not in Bankruptcy, to effect a composition of creditors in a Class Action, and bind this Petitioner, who was a non-resident residing in Chicago, Illinois, through service by publication (Tr. p. 51). All of such proceeding being predicated upon an attempted Class Action filed on March 12th, 1936, by *William J. Meredith et al vs. City of Ennis, Texas*, in the Federal District Court for the Northern District of Texas, after the passage of the Municipal Bankruptcy Act of May 24th, 1934, Chapter IX, Sec. 78-80, 11 U.S.C.A., 301 et seq., which conferred jurisdiction on Federal Courts sitting in Bankruptcy and not in Equity. This act was held unconstitutional by this Court in *Ashton vs. Cameron Co. Water Imp. Dist. No.* 1, 298 U.S. 541, 56 S. Ct. 901, on May 25th, 1936, but was in force and effect at the time of the filing

of said suit, viz: March 12th, 1936. The Amended Bankruptcy Act, 11 U.S.C.A., Sec. 401 et seq., 50 Statutes 653, became a law August 16th, 1937, which was prior to the time the decree in said cause was rendered on September 23rd, 1937.

This raises the following important questions:

(A) Did the Federal District Court have jurisdiction to consider such a class action in equity, between municipal bondholders, and render such a decree as was rendered in the Meredith case, the effect of which is to force a composition of creditors, after the passage of the Municipal Bankruptcy Act, of May 24th, 1934, which conferred such jurisdiction on Bankruptcy Courts?

(B) Had Congress, prior to the passage of the Municipal Bankruptcy Act, ever conferred jurisdiction upon Federal Courts, sitting in equity in a class action, to render a decree binding non-resident municipal bondholders by publication, and effect a composition of creditors?

(C) Has the Federal Court sitting in equity in a class action the power to render a decree and bind a nonresident municipal bondholders by publication notice, which impairs the obligation of its pre-existing contract, and take its property without due process of law?

(4) The cases believed to sustain said jurisdiction are as follows:

Forsyth vs. Hammond, 166 U.S. 506, 41 L. Ed.

1095; 17 S. Ct. 665.

Hamilton Brown Shoe Co. vs. Wolf Bros. & Co., 240 U.S. 251; 60 L. Ed. 629; 36 S. Ct. 269.

Baum vs. Coty, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

-III-

STATEMENT OF THE CASE

This has already been stated in the preceding Petition, Par. I, page 2 et seq., which is hereby adopted and made a part of this brief.

-IV-

SPECIFICATIONS OF ERROR

(A) The Court erred in holding that the Federal District Court for the Northern District of Texas, sitting in Equity, had jurisdiction to render the decree in the case of *William J. Meredith et al vs. City of Ennis, Texas*, No. 3650-906, and bind this Petitioner, a non-resident bondholder, through publication notice, which was filed and a decree rendered therein after the passage by the Federal Congress of the Municipal Bankruptcy Act, Chapters IX, Sections 78 to 80, 81 to 84, 11 U. S. C. A. 301 and 401 et seq., 48 Statutes 798, and 50 Statutes 653, which conferred such power upon Federal Courts sitting in bankruptcy.

(B) The Court erred in holding that the case of William J. Meredith et al vs. City of Ennis, Texas, et al, No. 3650-906, was such a class action that bound this Petitioner.

(C) The Court erred in finding that this Petitioner, after judgment, electing to come into this Cause and make a direct attack upon the decree in the Meredith case, asserting it was not bound by it, waived or released any right it might have in Civil Action No. 10 to the levy of a tax to pay its original bonds and the judgment therein rendered.

(D) That the Court erred in finding that this Petitioner's Original Petition in Civil Action No. 10, filed October 7th, 1938, and its Plea of Intervention filed May 19th, 1939, comes too late to modify the decree under Title 28, Sec. 118 of the U.S.C.A., Judicial Code 57.

(E) That the Court erred in holding that this Petitioner in its Plea of Intervention failed to serve any of the parties in the case of William J. Meredith et al vs. City of Ennis, Texas, et al, No. 3650-906 in Equity.

(F) That the Court erred in refusing to require the City to reimburse the Interest and Sinking Fund Account of Ennis, Texas, Street Paving Bonds, Series No. 2, dated May 10th, 1923, to the extent of $4,898.91, which was the Petitioner's pro rata part of the $6,850.22 wrongfully taken out of the Interest

and Sinking Fund Account in the Meredith case, without its consent or agreement thereto.

(G) The Court erred in failing to grant to this Petitioner, as prayed for in its Petition for Intervention in the Meredith case, its share of the taxing power of the City of Ennis to pay its unrefunded bonds, regardless of the decree in the Meredith case.

-V-

SUMMARY OF THE ARGUMENT

-A-

POINT 1: Jurisdiction has never been conferred by Congress on a Federal Court sitting either in law or in equity, to render a decree, the effect of which will cause composition of municipal debts. This has been long recognized by Congress and by the Courts of this country, and especially this Court in *United States vs. Bekins*, 304 U.S. 27, 58 S. Ct. 811, as this Court here recognized that there is no Forum in which taxing agencies might force a composition of their debts, which creates a necessity for the Muni cipal Bankruptcy Act,, 11 U.S.C.A. 301 and 401 et seq., 50 Statutes 653; *Perry County, Ky., vs. Catholic Order of Foresters*, 17 Fed. Sup. 316; *Women's Catholic Order of Foresters vs. Arlington*, 28 Fed. Supp. 663; *Ladew vs. Tennessee Copper Co.*, 218 U. S. 358, 31 S. Ct. 81, 54 L. Ed. 1069. If a Court in Equity had that power in a class action, then there was no necessity for the Municipal Bankruptcy Act.

Under our various Assignments of Error to the United States Circuit Court of Appeals, they were directed to the holding of the Court that the judgment rendered in the suit of *William J. Meredith et al vs. City of Ennis, Texas*, No. 3650-906, is void as to this Petitioner, as only Courts of Bankruptcy have the power to render a decree that would bind it to accept refunding bonds. The particular question of jurisdiction was raised in the trial court and in Motion for Rehearing to the United States Circuit Court of Appeals (Tr. p. 132), which was refused.

The question of jurisdiction can be raised any time, without previous Assignment of Error, and it is the duty of the Circuit Court to take notice of lack of jurisdiction of the inferior court. *Morrison vs. Burnette*, 154 Fed. 617, appeal dismissed; *Laurel Oil & Gas Co. vs. Morrison*, 212 U.S. 291, 29 S. Ct. 394,, 53 L. Ed. 517; *Toledo Newspaper Co. vs. U.S.* 237 Fed. 986, affirming 220 Fed. 458 and affirmed, 247 U.S. 402, 38 S. Ct. 560, 62 L. Ed. 1186; *Spencer vs. Patey*, 243 Fed. 555; *Supreme Council of Royal Arcanum vs. Hobart*, 244 Fed. 385; *Chicot Drainage Dist. vs. Baxter State Bank*, 308 U.S. 376, 60 S. Ct. 319.

POINT 2: The decree in the Meredith suit was rendered in Equity and the Court was not sitting in Bankruptcy, therefore it had no power at the time the decree was rendered to enter a decree binding this Petitioner, and forcing it to accept bonds of different maturities and different rates of interest, as a Bankruptcy Court was the only Forum available to accom-

plish a composition of creditors.

The Bankruptcy Statute was in full force and effect at the time the W. J. Meredith suit was filed, viz: On March 12th, 1936, as Chapter IX, Sec. 78-80, 11 U.S.C.A. 301, became a law on May 24th, 1934, and was not held to be unconstitutional until the decision in *Ashton vs. Cameron Co. Water Imp. Dist. No.* 1, 298 U.S. 541, 56 S. Ct. 901, on May 25th, 1936. The Bankruptcy Act was amended, Chapter IX, 11 U.S.C.A. 401, 50 Statutes 653, which became a law on the 16th day of August, 1937, while the decree entered in the Meredith suit was not rendered until September 23rd, 1937.

This Court expressly holds that the actual existence of the Statutes is an operative fact and cannot be justly ignored: *Chicot Drainage Dist. vs. Baxter State Bank*, 308 U.S. 374, 60 S. Ct. 317.

The Bankruptcy Act being in full force and effect at the time the Meredith suit was filed, and the jurisdiction having been conferred upon Courts of Bankruptcy, and likewise being in effect before the decree was filed, then that Court and that Court alone had jurisdiction to bind this Petitioner and force it to accept bonds of different rates of interest and different maturities, as provided in the original bond contract. It is only in the Bankruptcy Court that you can impair the obligation of this Petitioner's pre-existing bond tract, as held in *United States vs. Bekins*, 304 U.S. 27, 58 S. Ct. 811; holding it cannot be impaired; *City of Austin vs. Cahill*, 99 Tex.

175; 88 S.W. 542; *Constitution of the United States*, Art. 1, Par. 10; *Murray vs. Charleston*, 96 U.S. 436, 34 L. Ed. 760; *Mobile vs. Watson*, 116 U.S. 289, 6. S. Ct. 398, 29 L. Ed. 620.

The Meredith decree, which this Petitioner has assailed through its Assignments of Error as not binding upon it, takes this Petitioner's property, viz: Its interest and sinking fund, as well as the taxing power belonging to it, without due process of law; this cannot be done in a decree entered in a class action filed in equity by one bondholder against non-resident bondholders, who were neither party plaintiffs nor defendants in said class suit, had no notice, except by publication, and did not consent thereto or ever accept the benefits of said decree, as was held in:

Women's Catholic Order of Foresters vs. City of Arlington, 28 Fed. Sup. 663;

Brooklyn vs. Ins. Co., 99 U.S. 368, 370; 25 L. Ed. 416.

Cooper vs. Reynolds, 10 Wall 308; 77 U.S. 308.

Empire vs. Darlington, 101 U.S. 87.

St. Clair vs. Cox, 106 U.S. 350-353; 1. St. Ct. 354.

Pana vs. Bowler, 107 U.S. 529-545; 2 S. Ct. 704.

Harrigan vs. Pounds, 265 N.Y. Sup. 676.

Wabash vs. Adelbert College, 208 U.S. 28-57; 32 L. Ed. 379; 28 S. Ct. 182.

Compton vs. Jessup, 68 Fed. 263.

Hamer vs. N. Y. Ry. Co., 244 U.S. 266; 61 L. Ed. 1125; 37 S. Ct. 511.

Blaylock vs. Small, 127 U.S. 96-104.

Ayer vs. Kemper, 48 Fed. (2d) 11.

This Petitioner being bound only through publication notice (Tr. p. 51), such constitutes a failure of due process, as the procedure here did not protect it, an absent party, to its fair share of either money or taxing power.

C. B. & Q. Ry. vs. Chicago, 166 U.S. 226, 235; 17 S. Ct. 581, 584; 41 L. Ed. 979.

Hansberry vs. Lee, 311 U.S. 32, 61 S. Ct. 118, decided Nov. 12, 1940.

Women's Catholic Order of Foresters vs. Arlington, 28 Fed. Sup. 663.

-B-

We feel that the Court erred in holding that the Meredith suit was such a class action as would bind this Petitioner, and is contrary to both the law and the evidence. The facts are that this Petitioner owned $25,000.00 of City of Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, and the issuance of these bonds creates a separate and distinct contract from all of the other bonds issued by the city. There were eleven separate and distinct issues (Tr. p. 21), and the ordinance itself and the Constitution and Laws of the State of Texas, provides for an election to be held and authorize the levy of a tax upon the property within the city to pay each particular issue of bonds. It is provided that when said tax is collected, it shall be placed in a separate and distinct fund, and can be used for no other purpose, save and except to pay these bonds, as provided in Articles 707, 839, and 1015, of the Revised Civil Statutes of the State of Texas.

Therefore, in order for the Plaintiff, W. J. Meredith, to file a class action that would bind this defendant, it would be necessary at the time of the filing of the suit for him to own and possess bonds of the same series, so that he would be in privy with this Petitioner and be able to stand for and bind it, as each issue of municipal bonds represents a different class and creates a separate trust to provide for payment of that particular issue, and holders of bonds of another issue are not in the same class, in the sense that their interests are identical, so that they can act for them.

Here in this case the facts are that Meredith took from the trust funds of this Petitioner's bonds the sum of $6,850.22 (Tr. p. 102) and placed it in a special fund for all the bonds, and left only $2,667.09 in the special fund for this Petitioner's bonds, and nothing in the interest and sinking fund. This Petitioner was entitled to the sum of $4,898.91 as its proportionate part of said earmarked fund (Tr. p. 78 and 106), which was in truth and fact dissipated in an Equity Court.

Meredith and all other plaintiffs were officers of the Brown-Crummer Investment Company of Wichita, Kansas (Tr. p. 2) who made and entered into a refunding agreement with the City of Ennis (Tr. p. 14-20), and after the filing of said suit later acquired $423,000.00 of the total bonds of said city, as alleged in his Third Supplemental Bill of Complaint (Tr. p. 9-11) filed on the day the decree was entered; which was necessary in order to perfect

the refunding agreement; $14,500.00 were bonds of the same series as the ones owned by this Petitioner. We believe the evidence shows that these plaintiffs did not stand for this Petitioner or have identical interests, but were interestd in the larger amount of bonds, of other classes and other trusts, and took from the earmarked trust fund of this Petitioner's bonds and used it to rehabilitate the insufficient trusts of the other $408,500.00 bonds which they had acquired. This fact alone shows that plaintiffs did not meet the requirements as a representative with identical interests in class action, so that they could stand for this Petitioner, as laid down by the Supreme Court in *Hansberry vs. Lee*, 311 U.S. 312, 60 S. Ct. 115, decided Nov. 12th, 1940; *Georgetown vs. Alexander Coal Co.*, 37 U.S. 91, 9 L. Ed. 1012; *Ayer vs. Kemper*, 48 Fed. (2d) 11; *Bickford vs. Federal Reserve Bank*, 5 Fed. Sup. 875; *Mass. vs. Sullivan*, 207 N. Y. Sup. 181.

The mere allegation that the suit was brought on behalf of all who should join and pay the expense, and who were to be paid from the levies of a tax, is not a sufficient allegation to bind this Petitioner, and contrary t othe reasoning of this Court in *Compton vs. Jessup*, 68 Fed. 263; *Wabash vs. Adelbert College*, 208 U.S. 38-57; 32 L. Ed. 379; 28 S. Ct. 182; *Women's Catholic Order of Foresters vs. Arlington*, 28 Fed. Sup. 662; *Hamer vs. New York Ry. Co.*, 244 U. S. 266; 61 L. Ed. 1125; 37 S. Ct. 511.

We feel the decree itself as rendered was not a decree rendered in a class action, but one purely and

simply as a consent decree, which would bind only those who agreed to it. *Myllius vs. Smith*, 53 W. Va. 173, 448 S.E. 542; *Hodgson vs. Vroom*, 266 Fed. 267; *Conn vs. Penn*, 18 U.S. 424; 5 Wheaton 426. Being a consent decree certainly could not bind this Petitioner through citation by publication, unless it voluntarily appeared and entered therein.

The Court cannot enter a consent decree entirely without the scope of the pleadings, or on a cause of action other than that stated in the pleadings. *State vs. Muench*, 217 Mo. 124, 117 S.W. 25; *Roseborough vs. Ansley*, 35 O. St. 107; *Schmidt vs. Gold Min. Co.*, 28 Ore. 9; 40 Pac. 46.

The facts are that Meredith, Rogers and Martin, officials and attorneys of the Brown-Crummer Investment Company, filed suit on March 12th, 1936, and on June 10th of that year (Tr. p. 10), Judge Phillips, representing the city, argued a motion to dismiss, and the case to that stage was very highly contested between the city and the plaintiffs. After that, on the 21st day of June, 1937, the city entered into a contract with the Brown-Crummer Investment Company to refund its bonds, and there it lost every scintilla it ever had of a contested suit or class action. The plaintiffs had agreed to acquire 75 per cent of the par amount of outstanding bonds and warrants of the city (Tr. p. 20) under a refunding plan, and the city agreed to pay the Brown-Crummer Investment Company $17.50 per thousand for assembling the bonds and making the exchange, and agreed with them as to the levy of taxes to support

the outstanding bonds who accept the terms of the proposal (Tr. p. 19). This being adopted in the pleadings of the original plaintiffs (Tr. p. 9-10-11), and in the pleadings by the city (Tr. p. 11-14), it lost all elements of a class action and the decree itself, when entered, became a decree between consenting parties, and it so states (Tr. p. 22) in the decree. The entire object was to adjust and compromise the controversy (Tr. p. 14), as provided in the refunding agreement, and the decree itself was approved by the attorneys for the complainants and respondents (Tr. p. 48). The decree finds that the contract entered into by and between the Brown-Crummer Investment Company and the city had been consented to and adopted by the complainants and respondents, and the contract itself was approved (Tr. p. 24). In order that all parties thereto are authorized and directed to perform all things necessary to effect and carry out the contract (referring to the refunding contract) and in the decree (Tr. p. 46) the Court finds that both parties have *consented* (italics ours) in open court, and waive any right to appeal, meaning the consenting parties. Therefore, they could certainly not bind non-appearing bondholders, through publication notice, not to appeal, and agree to a refunding contract it had never seen or contemplated in the original petition or notice. Clause III of the decree deals only with the $423,000.00 bonds before the Court (Tr. p. 25-36), and out of the total outstanding $43,500.00 Street Paving Bonds, Second Series, dated May 10th, 1923, the decree finds that only Bonds Nos. 56 through 80, aggregating $14,-

500.00 are valid outstanding and binding obligations, and ordered them exchanged for refunding bonds (Tr. p. 27-35-36), none of which belonged to this Petitioner. In the decree in Clause XIX (Tr. p. 47) it used these words—"the complainants herein and any and all holders of all bonds and warrants exchanged for refunding bonds, are decreed to have notice and knowledge of all the terms of the refunding bond contract, dated June 21st, 1937, and to have consented and agreed to all of the terms thereof." None of the bonds of this Petitioner were described in the pleadings in said suit and in the decree, and we contend this clause is sufficient to make this binding only on the consenting parties. Clause XX of the decree (Tr. p. 47) retained jurisdiction "to hear, determine and adjudicate, the validity of the claims of all persons, firms or corporations, who claim to be the holders of obligations of the Respondent, not *declared* (italics ours) upon, and described in the pleadings of the complainant heretofore filed," —and "to hear, determine and adjudicate the equitable rights and interests, if any, of any such claimant, in and to the balance of the interest and sinking fund remaining on hand of respondent city, after the disbursements herein authorized, have been made in accordance with the decree, and the delinquent taxes owing to the respondent city."

Therefore, considering the entire suit, we believe that it lacks the elements of such class action as would bind this Ptitioner, and that the Court has committed error in its finding of fact and conclusions of law, that this Petitioner was bound by said

decree, which on its face is merely a consent decree to carry out the refunding program, and binds only those creditors who consented and were actually before the Court.

This Petitioner was a necessary party and must necessarily be joined and served in order to bind it. It has the right to fight for the proper distribution of taxes pledged to support its bonds, and its share of the money on hand, and especially in its trust fund, and it has the right to be heard, so that it could force the city to apply the sum of $25,430.60 on hand March 1st, 1937, to the payment of the Waterworks and Sewer Bonds which were not dealt with or taken into consideration or disbursed to creditors under the refunding plan or at the time said decree in the Meredith suit was entered (Tr. p. 101). This amount was available under the charter to pay any waterworks or sewer bonds issued by the city (Tr. p. 105), and of which there were outstanding $53,000.00 Water System Bonds, dated August 15th, 1925; $30,000.00 Sewer Bonds, dated September 15th, 1926; $29,000.00 Water and Sewer Bonds, dated July 10th, 1923, and $39,000.00 Water and Sewer Bonds dated October 10th, 1923, a total of $151,000.00 (Exhibit A, Tr. p. 21) which would have released sufficient tax funds to pay this Petitioner and the remainder of the bonds in full, if it had been so applied.

Such a decree as entered is contrary to the principles of good faith as found by this Court in *United Mutual Life Ins. Co., Petitioner, vs. Avon Park, Fla.*, 61 S. Ct. 157, 85 L. Ed. 112, decided on November

25th, 1940, Case No. 31, holding that a composition of Municipal Indebtedness can only be accomplished by a Federal Court sitting in bankruptcy, and affording the bondholders all of the protection of the Bankruptcy Act, to the end that all bondholders may be afforded a degree of good faith.

-C-

This Petitioner having elected to come into this Cause and make a direct attack did not waive any rights to the levy of a tax for the collection of its judgment, or its original bonds, which have never been exchanged.

The decree in the Meredith case was collaterally attacked in Civil Action No. 10 by this Petitioner, wherein it asked for mandatory relief and the use of funds allocated out of taxes to pay its bonds, contrary to the disposition of the funds and taxes prescribed in the decree (Tr. p. 51).

The city answered that the Court had exclusive jurisdiction in the Meredith suit to determine these rights. On January 25th at the trial of Civil Action No. 10 (Tr. p. 52) the Court held that this Petitioner should have its day in Court, and should take it in the Equity case, as the decree bound this Petitioner in so far as this Forum is concerned. In order that this Petitioner might not be bound (Tr. p. 54) the Court said he would open the decree for this Petitioner, if it desired to offer testimony in that cause —giving this Petitioner the right to have its origi-

nal suit dismssed, or file a Plea of Intervention. On February 1st, after further argument, the Court gave Petitioner a judgment, and did not dismiss the suit, and opened the decree (Tr. p. 58-5), so that Petitioner could come in and make a direct attack and assert its rights. The Forum in which this Petitioner could make its attack was the original Meredith suit. The decree itself held it open for that purpose and the Court opened it, which is in accordance with the holding of this Court in *Chicot Drainage Dist. vs. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317; Hawley *vs. Fairbanks*, 108 U.S. 543; 2 S. Ct. 846.

This Petitioner entered the Meredith suit and made a direct attack, both in its Plea of Intervention (Tr. p. 64) and its Motion to Modify the Decree (Tr. p. 91), alleging that it was not a party to said decree and was not bound. It asked that the City of Ennis be ordered to reimburse the Interest and Sinking Fund Account of Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, to the extent of $4,898.91, and also asked for its share of the money collected from delinquent taxes of specific levies made for this Petitioner's bonds, prior to the year of 1936, and collected since that date, which is dealt with and taken without its consent. That the city be ordered to withdraw from the Interest and Sinking Fund Account of Ennis, Texas, Refunding Bonds, Series 1937-C, which included $25,000.00 Refunding Bonds to take up this Petitioner's bonds never exchanged, and in which there was a surplus of $4,500.00, and place it in the Interest and Sinking Fund Account of this Petitioner's bonds, in lieu of

the omitted tax levies made to pay this Intervener's bonds for the years of 1937, 1938 and 1939, as a failure to levy a tax to support a prior bond issue, is automatically levied from year to year, when it is omitted from the annual tax levying ordinance, which was so held in the case of *City of Waco vs. Mann*, 127 S. W. (2d) 879. Intervenor further prayed for tax levy to support its original bonds and asked that the judgment be modified, if necessary, so that such tax could be levied, the Court having held that this was the *only Forum open for such relief* (Tr. p. 52) (italics ours). We opine, how can it be said that we waived these rights in the original cause of action by coming here and making a direct attack upon the judgment plead in defense by the city in Civil Action No. 10? In other words, the District Court held we could not make a collateral attack in Civil Action No. 10. We came in and made a direct attack in the Meredith suit and the Court holds that we have waived our rights to relief by coming into the very Forum that he opens to us for that purpose. We feel that this is reversible error.

-D-

We feel that the Court has committed error in finding that this Petitioner is prevented from complaining of the equities in the former class suit, as more than a year had elapsed since the entry of said decree before Petitioner filed its original suit. The equity decree is held open specifically by its terms for this Petitioner to enter therein and assert its rights (Tr. p. 48), with no provision when it shall become

final. Title 28, Sec. 118, U.S.C.A. and (Judicial Code 57) does not apply to this kind or type of suit, but applies solely to the purpose of aiding, assisting and forcing of equitable liens, or removing encumbrances or clouds of title from real and personal property. The Supreme Court having held in *Brooklyn vs. Insurance Co.* that the statute was not applicable to purported class action by one bondholder seeking to enforce the collection of taxes for the benefit of all. Then naturally this statute would not apply as a limitation against this Petitioner to enforce its rights herein—especially in view of the fact that long prior hereto, in Civil Action No. 10, the decree was reopened, and at that time the Appellee neither filed or lodged any exception to the Court's reopening of the decree, it cannot now come in at this late day and be heard to complain. In view of the fact that the original decree was held open to hear, ascertain, determine and adjudicate the equitable rights of holders of all obligations of respondent city, not declared upon therein, the city being a party to that decree and agreeing thereto, it is now estopped from claiming that this appellant's rights to intervene and attack such decree should be barred, unless filed within one year, when it was acting as the cestiu que trust for the Petitioner's bonds, and unless the city can show that the fund is available to pay on the debt, it cannot take advantage of its own wrong by pleading the Statute of Limitation; so held in *Denver-Greeley Irr. Dist. vs. McNeil*, 80 Fed. (2d) 929; *Lincoln Co. vs. Luning*, 133 U.S. 530; 33 L. Ed. 766; 10 S. Ct. 363; *Perez vs. Perez*, 220 U.S. 224; 31

S. Ct. 412-414; 55 L. Ed. 443; *Hawley vs. Fairbanks*, 108 U.S. 543; 2 S. Ct. 846.

Robertson vs. Blaine Co., 90 Fed. 63, 47 L.R.A. 459.

Hubben vs. City of S. Hutchinson, 64 Kan. 645, 68 P. 52.

Rogers vs. City of Omaha, 82 Neb. 118, 117 N. W. 119.

We further believe that such defense would not be available, as this Petitioner was not before the Court, as it was not bound by Publication Notice, as held in:

Chase Nat'l. Bank v. City of Norwalk, 291 U.S. 431; 54 S. Ct. 475.

Brooklyn vs. Insurance Co., 99 U.S. 362-370.

Pana vs. Bowler, 107 U.S. 529; 2 S. Ct. 704.

Brown vs. Crawford, 252 Fed. 248.

Tex. & Pac. Ry. Co. vs. Johnson, 76 Tex. 432; 12 S.W. 463; 151 U.S. 102.

Women's Catholic Order vs. Arlington, 28 Fed. Sup. 663.

Harrigan vs. Pounds, 1933, 265 N.Y. Sup. 676.

Mass. vs. Sullivan, 207 N.Y. 181.

Compton vs. Jessup, 68 Fed. 263.

E

The findings of the trial court and affirmance by the Circuit Court of Appeals, that Petitioner failed to serve all parties in the Original Equity Decree is contrary to the evidence and prior finding of the District Court (Tr. p. 62 and 61). The Order authorizes and shows a copy of the Petition of Intervention was mailed to each of the attorneys of plaintiffs and defendants in the Meredith suit, in accordance with the Supreme Court Rules, and the special

finding of the Court that service was completed March 5th, 1940, and as no objection or exception being taken to such finding as shown by the record (Tr. p. 62-61), the City cannot raise the question.

The Judgment in Civil Action No. 10 (Tr. p. 59-61), Clause III, provides that the Meredith suit shall stand reopened when Plaintiff by appropriate proceedings in said Cause seeks the right to demonstrate that such Decree is improper, unfair or improvidently entered, with regard to the levy, assessment and collection of taxes. The Court had retained jurisdiction for that very purpose in the Meredith Decree (Tr. p. 47, Clause XX), and certified the judgment into this Cause. When the Court passed an order permitting this Petitioner to intervene and made an affirmative finding, that all parties at interest had been served with a copy of its Plea of Intervention, as provided by Supreme Court Rules (Tr. p. 62), such finding is conclusive as against the City, unless it is attacked and some affirmative evidence introduced showing that such finding is in error. No such testimony was offered or such finding justified by the Trial Court, which constitutes reversible error.

The relief asked for by this Petitioner is against the city, but even if the service had not been completed, as provided by the Rules of this Court, No. 4 and 24C, bondholders are not necessary parties, as is held in *Austin vs. Cahill*, 99 Tex. 175, 88 S. W. 542 (19):

> "That the holders of Refunding Bonds are not necessary parties in their own person, but are constructively present and represented through the city in a suit by the Original Bondholders to enforce the levy of a tax to pay original bonds not surrendered for refunding."

This suit is not analagous to the case of *City of Alvarado vs. Christian*, 100 Fed. (2d) 156, as held by the Circuit Court, as here all of the holders of bonds, save and except this Petitioner, have heretofore voluntarily appeared before the Court and accepted refunding bonds. This Petitioner's right to its collection does not depend upon retribution from the holders of refunding bonds, but upon the ability of the city to pay its obligations from tax sources. The Transcript (pp. 102-104) discloses that it has sufficient taxing power to pay refunding bonds, and that there is also ample taxing power to pay this Petitioner's bonds under its contract. Taxing power of 17 cents is ample to support refunding bonds, Series "C," and 11 cents would be more than sufficient to pay the principal and interest upon this Petitioner's bonds, especially in view of the excessive tax of 29 cents having been levied in 1937 and 1938, and a tax of 28 cents having been levied in 1939 to pay refunding bonds, Series "C," which has created a large surplus in its Interest and Sinking Fund Account.

All other bondholders have notice in the original decree that it is held open to the Petitioner to assert its rights and adjust its equities, as to both the money

and the taxes. The Court had only power to deal with funds on hand and taxes for the ensuing year. Taxes to be levied in 1939 could not be dealt with in 1937, as this power is vested in the legislative branch of our Government. Can it be said that refunding bondholders under the terms of this decree are even necessary parties to this Petitioner's suit for relief through a tax levy for 1939 to pay its judgment? We think not.

-F-

This Petitioner is entitled in this action to have its trust funds rehabilitated by the city to the extent of $4,898.91, which is this Intervener's pro rata part of the $6,850.22 wrongfully taken out of the Interest and Sinking Fund Account in the Meredith decree. This fund is the accumulation of money collected from tax levies made for this specific bond issue. Under Texas Constitution, Art. 11, Sec. 5 and 6, and Revised Civil Statutes No. 707, 839 and 1015, these funds can be used for no other purpose except to pay the particular bonds for which the money is collected. They constitute a trust fund for that purpose. *Hidalgo County Imp. Dist. No.* 1 *vs. Morey*, 74 Fed. (2d) 101; *U. S. ex rel Von Hoffman vs. Quincy*, 4 Wall 535; 18 L. Ed. 403; *Board of Liquidation of La. vs. McComb*, 92 U.S. 531, 23 L. Ed. 625; *Galena vs. Amy*, 5 Wall, 705; 18 L. Ed. 560; *Mobile vs. Watson*, 116 U.S. 289, 6 S. Ct. 398; 29 L. Ed. 620; *Jenkins vs. Entzminger* (Fla.) 135 So. 785.

The District Court in the Meredith case was without authority to take trust funds created by the

collection of a specific tax for Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, and utilize them for the payment of another bond issue, and the city is liable to this Petitioner in this suit for a rehabilitation of the trust, to the extent of the money wrongfully withdrawn. The taking of its trust funds in the light of the Texas Statutes and authorities here cited takes its property without due process of law, and the refusal of the trial court and Circuit Court to require the levy of a tax to rehabilitate this specific trust constitutes reversible error.

-G-

The United States Circuit Court of Appeals, in holding that the Meredith suit having utilized the entire taxing power for refunding bonds, is conclusive against this Petitioner as to its share of the taxing power of the City of Ennis to support its unrefunded bonds, as prayed for, is error.

The evidence shows that there has been no levy for this Petitioner's bonds since the year of 1936, nor has there been any money placed in the Interest and Sinking Fund Account from delinquent tax collections levied prior to 1936, and collected since that date, nor have any funds been transferred to the Interest and Sinking Fund Account of this Petitioner's bonds (Tr. p. 102). The Bond Contract provided for the levy each year (Tr. p. 108) of a specific amount to pay the bonds, and if the decree in itself took away the entire taxing power of the city and applied it to the payment of other bonds, then this Petitioner has the right to complain of said decree

and come into the very court, which took away its substantive right, to the levy of a tax to support its bonds and enforce such levy. Its right to enforce the tax levy has been held in the following cases:

Hawley vs. Fairbanks, 108 U.S. 543; 2 S. Ct. 846.

Rorick vs. Board of Com. Everglade Drainage Dist., 57 Fed. (2d) 1048.

Revised Civil Statutes of Texas, Art. 707 and 839.

Texas Constitution, Art. XI, Sec. 5 and 6.

Wade vs. Travis Co., 174 U.S. 506; 19 S. Ct. 715; 43 L. Ed. 1080.

City of Waco vs. Mann, 127 S.W. (2d) 879.

Mitchell Co. vs. Bank, 91 Tex. 361; 43 S.W. 880-883.

In *City of Aransas Pass et al vs. Keeling*, 113 Tex. 339, 247 S.W. 818, 821, the Court held:

> "It is settled that the actual levy by city authorities of an adequate tax is not essential to comply with the constitutional provision, where the law itself under which municipal bonds are issued mandatorily requires an adequate tax levy. As declared in Judge Brown's good opinion in *Mitchell Co. vs. Bank*, 91 Tex. (361) 370, 43 S. W. (880) 883, and expressly sanctioned by the Supreme Court of the United States in *Wade vs. Travis Co.*, 174 U.S. (499) 506, 19 S. Ct. 715, 43 L. Ed. 1080."

> " 'What the Constitution requires is that provision shall be made at the time or shall have been previously made, by which the rate of tax to be levied is so definitely fixed, as done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The Leg-

> islature has the power to make all such 'provision' for counties and cities, or it may leave it to the officers of such corporations to make it when the debt is created; if made by either it is sufficient..' "

In the *City of Waco vs. Mann*, 127 S.W. (2d) 879, the Supreme Court of Texas held that a tax levy to support an issue of refunding bonds is good where a sufficient margin of the taxing power remained to service outstanding bonds, where the tax-levying ordinance failed to make a specific levy for each of them.

> "Where law under which authorized bonds are issued specifically requires an adequate tax levy, a tax to support issue is automatically levied from year to year whether a specified rate is fixed or not."

In this case there were no levies and collections made by the City of Ennis, Texas, for Street Paving Bonds, Series No. 2, dated May 10th, 1923, for either of the years 1937, 1938, and 1939 (Tr. 102). At the time these bonds were issued there was levied for the years of 1936 the sum of $3,686.25, being $1,500.00 for principal due April 10th, 1937, and $1,113.75 for interest due April 10th, 1937, and $1,072.50 for interest due October 10th, 1937. For the year 1937, the sum of $3,603.75 was levied, being $1,500.00 principal due April 10th, 1938, and $1,072.50 for interest due April 10th, 1938, and $1,031.25 for interest due October 10th, 1938. For the year 1938 there was levied the sum of $3,521.25, being $1,500.00 for principal due April 10th, 1939,

and $1,031.25 for interest due April 10th, 1939, and $990.00 for interest due October 10th, 1939. For the year of 1939 there was levied the sum of $3,428.75, being $1,500.00 for principal due April 10th, 1940, and $990.00 for interest due April 10th, 1940, and $948.75 for interest due October 10th, 1940 (Tr. p. 108).

Under the Texas authorities it is the ministerial duty of the City Commission to determine the levy. Where it fails to do so, it is automatically levied, and this Petitioner certainly has the right to go into this very suit which dealt with the taxing power of the city, and obtain relief; enforce that which is pledged and given it under the bond contract, the Constitution and Statutes of Texas.

The evidence submitted at the trial shows that here there has accumulated a large surplus in the Interest and Sinking Fund Account of Refunding Bonds, 1937 Series "C," collected from excessive tax levies in 1937, 1938 and 1939 (Tr. p. 103).

Therefore, it is our contention that any construction that this decree delegates the full taxing power of the City of Ennis for refunding bonds, is void as to this Petitioner, and of no force and effect, and that the tax for this Petitioner's bonds was automatically levied, and it is entitled to have the money collected from tax levies made for Refunding Bonds 1937 Series "C" reapportioned for each of the years of 1937, 1938 and 1939, and applied in this very suit to the payment of its unrefunded bonds. The city and the Court approving, having utilized

the entire taxing power of the city for refunding bonds for the year 1937, takes away and impairs the bond contract entered into by the city, in which it agreed to levy taxes to pay Petitioner's bonds at maturity; and the holding of the Court requiring this Petitioner to accept refunding bonds, in order to secure its pledged tax, constitutes reversible error, as such decree is void as to it.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this application be granted, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of Texas, be reversed and judgment rendered for this Petitioner, as asked for in its Amended Plea of Intervention in said cause.

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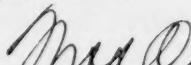
By 
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CHARLES ELMORE CROPLEY
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1940

No. 996

WOMEN'S CATHOLIC ORDER OF FORESTERS,
Petitioner,

vs.

CITY OF ENNIS, TEXAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INDEX

	Page
Statement of the Case	1
Summary of Argument	6
Point 1	8
Point 2	11
Point 3	17
Point 4	19
Conclusion	20

Authorities

United States Statutes

Page

Section 118, Title 28, U. S. Code 7, 17

Court Rules

Equity Rule 38 13

Federal Rule of Civil Procedure 24c 15

Table of Cases

Ashton v. Cameron Co. Water Imp. Dist. No. 1, 298 U. S. 513, 56 S. Ct. 892 16

Avant v. Brown, 91 S. W. (2d) 426 (Error dismissed) 19

Ayer v. Kemper, 48 F. (2d) 11 (Cert. den. 284 U. S. 639) 15

Bankers Life Co. v. City of Littlefield, Texas, 93 F. (2d) 152 11

Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett, 228 U. S. 559, 566, 33 S. Ct. 581, 584 16

City of Alvarado v. Christian, 100 F. (2d) 156 20

Continental Trust Co. v. Shunk Plow Co., 263 F. 873 (Cert. den. 40 S. Ct. 45) 17

C. J. Volume 34, p. 344, Sec. 557 20

Ferdig Oil Co. v. Wilson, 91 F. (2d) 857 19

Hyde v. Keihl, 183 Pa. 414, 38 Atl. 998 10

Jellnick v. Huron Mining Co., 177 U. S. 1, 20 St. Ct. 559 18

Johnson v. First National Bank, 117 N. E. 676, 678 10

Leadville Coal Co. v. Wm. McCreary, Trustee, 141 U. S. 475, 12 S. Ct. 28 18

Marine Iron Works v. Wiess, 148 F. 153 10

Mitchell v. Kemp and Burpee Mfg. Co., 218 F. 843 10

Norton v. Shelby Co., 118 U. S. 425, 442, 6 S. Ct. 1121, 1125 16

Page

Pokegama Sugar Pine Co. v. Klamath R. L. & I. Co., 76 F. 34 10

R. C. L. Volume 27, p. 904 10

Rubber Company v. Williams Auto Company, 81 S. W. (2d) 255 20

Shawver v. Masterson, 65 S. W. (2d) 1111 (Error dismissed) 9

State v. Brown, 64 S. W. (2d) 841, 848 10

Supreme Forest Woodmen Circle v. City of Belton, Texas, 66 S. W. (2d) 439 12

Supreme Forest Woodmen Circle v. City of Belton, Texas, 100 F. (2d) 655 11

Supreme Tribe of Ben Hur v. Cauble, 41 S. Ct. 338, 255 U. S. 356 13

Switzer v. Smith (Tex. Com. App.), 300 S. W. 31, 33, 68 A. L. R. 377 19

Union Trust Co. v. Jones, 16 F. (2d) 236, 239 14

U. S. v. California Coop. Canneries, 279 U. S. 553, 49 S. Ct. 423 14

Voorhies v. City of Houston, 7 S. W. 679 12

Winters Mutual Aid Association v. Readin, 49 S. W. (2d) 1095 9

Women's Catholic Order of Foresters v. City of Ennis, Texas, et al., 116 F. (2d) 270 6

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The case from which this appeal arises originated on March 12, 1936, upon the filing of a complaint in equity by W. J. Meredith, et al., against the City of Ennis, Texas, and its officers. The complainants sued as owners of defaulted items of bonded indebtedness of the City of Ennis, instituting their suit as a class action (R. 3, 52, 127) on behalf of all holders of bonds and warrants payable from a common source, that is, the city's tax resources. Such resources were then wholly inadequate to support said indebtedness (R. 9, 111, 128). In this suit the original complainants sought the various relief which they considered necessary to enforce the legal and equitable rights

of all the city's bond and warrant holders so as to make available for them the maximum tax resources of the city on a basis of equality, one with the other (R. 2-4). Under appropriate orders the trial court took jurisdiction of all the city's funds and resources available for application upon its outstanding bond and warrant indebtedness and admonished all parties in interest to appear and file their claims on or before May 2, 1936 (R. 4-7). This warning order provided specifically that the court would, upon final hearing, ascertain, adjudicate, distribute and allocate said funds and resources among the city's creditors entitled thereto, and, in accordance with such order, was mailed to all known holders of bonds and warrants and published once a week for six consecutive weeks, the last publication being at least thirty days prior to May 2, 1936 (R. 4, 5). In the final decree in said equity case the court approved the aforesaid mailing and publication as notice to all absent interested parties (R. 5). Petitioner nowhere denies actual notice of the equity suit.

The city was represented by able counsel and strenuously contested complainants' demands (R. 109, 125) until on September 23, 1937, the parties appeared and sought the court's approval of a decree adjudicating the rights of the city and its bond and warrant creditors under a refunding arrangement involving a nominal adjustment of old interest and a par-for-par exchange of outstanding bonds and warrants for refunding bonds bearing a slightly lesser rate of interest than that borne by the obligations then outstanding (R. 21, 49, 50). The court considered the request, and after a full disclosure of all pertinent facts, and after examining into the fairness and equity of the provisions of such decree with relation to the rights of

the creditors and the city's maximum ability to pay (R. 21), the court on September 23, 1937, entered a decree wherein among other things the refunding arrangements were approved and adopted and the funds for the payment of the city's indebtedness were distributed and allocated equitably among all bond and warrant holders so that none might be preferred over others, in accordance with the notice previously issued to the effect that such would be done. The petitioner's rights under that decree are identical with the rights of all others owning obligations of the same dignity as petitioners. There was never a suggestion of any collusiveness by the parties in the entry of that decree (R. 110).

The original complainants, as well as sixteen separate intervenors (R. 8, 125) in the equity case, thereupon tendered their obligations for refunding and adjustment in accordance with the court's decree, with the result that at the present time out of $497,000.00 principal amount of bonds and warrants, all have come in under the court's decree and refunding arrangements save and except those owned by petitioner in the aggregate principal amount of $25,000.00 (R. 50). In other words, the owners of approximately 95% of the city's outstanding bond and warrant indebtedness have complied with the court's decree.

Many holders whose obligations were not approved for participation in the refunding under the original decree came in later upon application for supplemental decrees, seeking the benefits of the refunding adjudged under said original decree. The court had retained jurisdiction specifically for this purpose, that is, to determine whether the claims of absent parties might thereafter be exchanged

for refunding bonds, and to determine the rights of any such claimants in the funds on hand for that purpose (R. 48).

On October 7, 1938, approximately two years and eight months after the institution of the equity proceedings and more than one year after the entry of the equity decree, the petitioner here filed its complaint against the City of Ennis in the same court in which the equity suit was lodged, and this became known as "Civil Action No. 10" on the docket of that court. In this independent action the petitioner sought judgment upon matured items pertaining to its bonds and demanded relief with regard to the use of funds and allocation of taxes contrary to the disposition thereof prescribed by the decree in the equity case. At the conclusion of the trial of Civil Action No. 10, the court announced that under the circumstances he considered that petitioner was bound by the equity decree (R. 52), but further announced that if petitioner considered itself right in its contentions as against the judgment of the court, the court would dismiss the civil action and petitioner could appeal from such order of dismissal (R. 57). Upon petitioner's request the court allowed it time in which to choose between the resulting alternatives (R. 57), that is, between an order dismissing Civil Action No. 10, from which petitioner might appeal and obtain a review of the court's judgment, and an order designating petitioner's suit as an intervention in the equity case affording petitioner the same relief as granted other holders in that case (R. 57). Subsequently, petitioner announced its election to accept the second alternative (R. 57), and thereupon formal judgment was entered in Civil Action No. 10, providing that same might be certified into the

equity case wherein petitioner had the right to participate, granting appellant an opportunity by appropriate proceedings in said equity case to demonstrate that the decree was improper, unfair or improvidently entered with regard to the levy, assessment and collection of taxes in respondent city and the refunding agreement therein approved as same affected petitioner, and providing that the decree should stand reopened if petitioner should succeed in this (R. 59, 61). *Petitioner did not prosecute an appeal from this judgment and same has long since become final and is now res judicata as to all claims asserted by petitioner in the civil action.*

Thereupon, petitioner filed an intervention and motion to modify the equity decree, asserting the same demands for relief as it had contended for in the civil action (R. 51, 64-79). The court, upon a hearing of the intervention, held that petitioner's motion to modify should be overruled; that the relief sought in its petition should be denied; and that petitioner should have its participation in the funds and resources of the city under the terms of the equity decree as and when it should see fit to accept same (R. 113). At the hearing it was demonstrated (R. 100, 101) and the court found (R. 111) that the city was unable to pay its obligations as same existed prior to the equity decree had it not been for the refinancing approved therein, and that the affairs of the city were rehabilitated by reason of such refinancing. *The petitioner assigned no error to this finding.* The court further found that petitioner had failed to demonstrate that the equity decree was wrongly entered as specified by the court and agreed by petitioner in Civil Action No. 10 as the only condition upon which the decree

should be reopened (R. 110). *The petitioner assigned no error to this finding.*

The Fifth Circuit Court of Appeals' opinion filed December 12, 1940 (R. 123-128), affirmed the judgment of the District Court and is now reported in 116 Fed. (2d) page 270.

The petition and brief upon which is rested petitioner's hope that this court may grant certiorari are devoid of discussion as to the primary reason under which, aside from the others named, the Court of Appeals considered that it must affirm the judgment of the District Court. This compelling reason is, that since petitioner reserved no exception and declined to appeal from the judgment in Civil Action No. 10, and voluntarily elected to pursue a course inconsistent with appeal and contrary to its position and contentions on appeal, it waived any errors that might be present in the judgment; that it elected to accept a judgment allowing intervention in the equity case and is bound by that election (R. 127)—and, strangely enough, the petitioner does not mention, much less undertake to distinguish, the authorities upon which the Court of Appeals based its decision.

SUMMARY OF ARGUMENT

1. The decision below is right because the court correctly held that by failing to take and prosecute an appeal from a judgment adverse to its claims in the civil action petitioner waived its right to do so; that by declining to appeal from the judgment entered pursuant to its election in Civil Action No. 10, petitioner waived any errors which might have been present therein; that by voluntarily

electing to proceed in the equity case, assuming the burden of demonstrating that same was wrongfully entered as a condition to opening the equity decree, petitioner became bound by that decree upon the trial court's finding that such condition had not been met and there being no error assigned to this finding in the Court of Appeals.

2. The decision below is right because the court correctly held that the original equity suit was properly a class action and the decree therein binding upon all members of the class represented, including petitioner, who could not thereafter re-litigate issues already litigated in a proper action.

3. The decision below is right because the court correctly found that personal notice of the class suit was given to every bondholder that could be located, and that notice was given to other creditors by publication as provided by the *Judicial Code*, 28 U. S. C. A., Section 118, and held that under such circumstances petitioner cannot be heard to complain of the equities in that suit in proceedings brought more than one year after the entry of a decree therein.

4. The decision below is right because the court correctly found that the petitioner had failed to serve any party to the original equity case other than the City of Ennis, and that such other parties and those holding interests under the decree had a vital interest in maintaining and should have been made parties to any action seeking to set aside the decree.

ARGUMENT

POINT 1

At the close of the hearing on petitioner's complaint in Civil Action No. 10, the trial court made it plain that the following two alternative courses or choice of procedure were open to petitioner (R. 59, 61, 110):

> 1. To take a dismissal of its civil action so that it might proceed on appeal therefrom to a final determination of its demands for relief as therein set out (R. 57).
>
> 2. To intervene in the equity case and submit its demands for adjustment in accordance with the rights therein prescribed to all bond holders.

Upon this announcement of alternatives on January 26, 1939, the trial court reassigned the case to February 1, 1939, in order that petitioner might be afforded an opportunity to consider and decide upon which of the alternatives it desired to pursue. On the day assigned petitioner voluntarily announced its election of the second alternative (R. 57), and the court then announced that petitioner should have judgment on its obligations for certification into the equity case where it might participate in the funds set aside for its benefit, and that the decree in the equity case should stand reopened only upon certain named conditions (R. 59).

Formal judgment was accordingly entered in Civil Action No. 10 on February 20, 1939, and therein the following appears:

> "That the decree entered in the aforesaid equity cause shall stand reopened if and when plaintiff (petitioner) by appropriate proceedings in said cause seeks the right to demonstrate to the court that said

> decree is improper, unfair or improvidently entered with regard to the levy, assessment and collection of taxes in respondent city and the refunding agreement therein approved, as same affects this plaintiff" (R. 61).

Petitioner reserved no exception to that judgment, has taken no appeal therefrom, and in addition has waived or released any errors which might be present therein by electing to pursue a remedy inconsistent with appeal. *Shawver v. Masterson*, 65 S. W. (2d) 1111, error dismissed; *Winters Mutual Aid Association v. Readin*, 49 S. W. (2d) 1095. Consequently all questions and demands for relief inconsistent with the judgment entered in Civil Action No. 10 became res judicata and by virtue of such judgment petitioner reserved to itself only the right to reopen the equity case upon the condition expressed by the judgment in such civil action entered pursuant to the alternative voluntarily chosen by it and in which it acquiesced. Petitioner agreed that it should be bound by the equity decree if it failed to meet those conditions. Upon trial of its intervention in the equity case the lower court found that petitioner had so failed (R. 110, 111). *No specification of error was assigned to this finding upon appeal to the circuit court* (R. 115-119). Under such circumstances petitioner released or waived any error which it might otherwise have asserted directed to this finding of the trial court and petitioner was then concluded by the trial court's judgment on its intervention in the equity case and became bound to accept the same measure of relief as is afforded all bond creditors under the equity decree. In other words, petitioner waived the only question open for decision in this appeal, namely: whether the trial court erred in finding that petitioner had failed to meet the only conditions upon which it had agreed

it might be entitled to reopen the equity decree and receive relief different from that decreed to and accepted by all other bond and warrant creditors.

The numerous authorities on the meaning of the term "waiver" are unanimous in holding that it is a voluntary relinquishment of a known right; that it is a voluntary act and implies an election to dispense with something of value, or to forego some advantage which might have been demanded and insisted upon. 27 *R. C. L.* 904; *State v. Brown*, 64 S. W. (2d) 841; *Mitchell v. Kemp and Burpee Mfg. Co.*, 218 Fed. 843; *Pokegama Sugar Pine Co. v. Klamath R. L. & I. Co.*, 76 Fed. 34; *Hyde v. Kiehl*, 183 Pa. 414, 38 Atl. 998; *Marine Iron Works v. Wiess*, 148 Fed. 153; *Johnson v. First National Bank*, 117 N. E. 676, 678.

In the instant case the waiver asserted by respondents has been effected by a voluntary act, also an election, with knowledge supported by legal advice to dispense with or to forego an advantage or right which petitioner might have demanded and insisted upon, that is, to appeal the claims asserted in the civil action.

Petitioner participated as an actor in procuring the order which it now seeks to avoid, and took its chances. To that end there was not only acquiescence on its part but intelligent dealing with the matter and consent to the judgment. By this consent it must be deemed to have made its election and should be held to it. *State v. Brown*, 64 S. W. (2d) 841, 848.

The Court of Appeals, giving effect to the authorities above cited, held that petitioner might have appealed from a judgment adverse to its claim in Civil Action No. 10, but had waived its right to do so and released any errors which

might be present in that suit by voluntarily electing to pursue a course inconsistent with appeal and contrary to its then position and contentions on appeal; that it elected to accept a judgment allowing intervention in the equity case and is now bound by that election (R. 127). Naturally, the Court of Appeals considered that the District Court's finding that petitioner had not met the conditions of the intervention was correct for no error was assigned to such finding (R. 115-119).

POINT 2

The original equity suit was properly brought and adjudicated as a class action, resulting in a decree conclusive as to all members of the class. Those who brought the suit set up the same claims as other members of the class in like situation could have asserted, and petitioner neither alleged nor proved any inadequacy in the complainant's representation. The common or general interest of all bond and warrant holders lies in the fact that their obligations are payable from a common source, that is, the city's authority to levy taxes therefor, and all of such obligations are of equal standing, one with the other, as charges against such taxing power. *Bankers Life Co. v. City of Littlefield, Texas*, 93 F. (2d) 152; *Supreme Forest Woodmen Circle v. City of Belton, Texas*, 100 F. (2d) 655. Petitioner asserts no claim which would or could have been decided differently in the equity action.

To remove itself from the maxim that equity is equality, petitioner complains that the court's decree in the equity case impairs its contract rights by taking away the funds and taxing powers pledged for its bonds. It does not take away, on the contrary it adjudges the extent of such funds

and taxing powers and apportions them. In every instance where bonds and warrants are issued in Texas the ordinance prescribes specific taxes for their payment. In this case, however, subsequent to the issuance of the obligations, the city's resources diminished to a point where it was impossible for it to carry out the provisions of the authorizing ordinances. All of said obligations constituted liens against the city's authority to tax as prescribed by the Constitution and laws of Texas, and it was necessary that the obligation holders call upon a court of equity to distribute those resources, then inadequate, so that all might receive their just share. This was by no means a novel circumstance, for the same conditions had necessitated similar action in many other instances in Texas.

The authority of the Court of Equity to prorate resources of a city which are inadequate to meet all obligations in full has long been established in Texas, beginning with the Supreme Court's decision in the case of *Voorhies v. City of Houston*, 7 S. W. 679, wherein Chief Justice Stayton wrote:

> "If there be a fund to which more than one creditor is compelled to look as the only source from which the claims can be paid and this is insufficient to pay all in full, then it is manifestly just, none of the claims having a preference, that the funds should be distributed pro rata."

In *Supreme Forest Woodmen Circle v. City of Belton, Texas*, 66 S. W. (2d) 439, a Texas court denied petitioner's contention that a Court of Equity does not have jurisdiction to administer the resources of an insolvent city. In that case the court occupied the same position as administrator of the city's diminished resources as the lower court

in this case and for the same reasons. In that case the Texas court held that a party to an action by creditors against the City of Belton in the Federal Court was bound by a judgment in the Federal Court giving directions as to the city's handling of money though not a party to the application to have the court direct the levy of a city tax and allocate its expenditure.

The basis of statutory permission for class actions is that otherwise justice might never be done if it were necessary to join all parties with interest in the subject matter or the object of a suit. In the present case justice could only be done by a Court of Equity determining the extent of resources available for the payment of the city's obligations and by an allocation of those resources among all creditors possessing equal rights and interests therein.

There are practical reasons for saying that the court can make its decree in a class suit effective and not have to retry the case at a later date when the members of the class who brought the suit must necessarily have set up the same claims and defenses as all absent parties in like situation with them. In the Court of Appeals petitioner rightly admitted that since the case of *Supreme Tribe of Ben Hur v. Cauble,* 41 S. Ct. 338, 255 U. S. 356, there is no question that absent parties may be bound under Rule 38 in a true class action *(Equity Rule 38)*. That case was one involving the rights of certificate holders in and to beneficial funds. The instant case is one involving the rights of bondholders, the beneficial owners of tax resources in and to such resources. In the *Ben Hur case* this court holds that a final decree in equity determines all rights in a fund over which the court has assumed juris-

diction in a class action and is conclusive as to actual parties as well as those who come in after a decree.

A decree in a class action affecting funds over which the court has assumed jurisdiction may not be res judicata as to the amount or validity of their claims but is to the extent that it affects the funds within the court's control. Petitioner has pointed out that the court in the equity decree expressly reserved jurisdiction for the adjudication of claims not represented at the time of the entry of such decree. Petitioner then says that by reason of this the court recognized that other claimants should have the right to come in later and assert their demands for full payment; that is to say that absent claimants should be allowed to later appear and interfere with the administrative orders of the court by demanding an allocation of funds and taxing power for their securities different from that already adjudged by the court and in a manner which would allow them to take advantage of the betterment created by and grant them a preference over others holding obligations of equal dignity.

Rarely should administrative orders and decrees rendered prior to intervention be set aside at intervenor's behest, especially unless a clear case is made out that such prior order and decree would deprive intervenor of substantial rights which he has not been remiss in pressing. *U. S. v. California Coop. Canneries*, 279 U. S. 553, 49 S. Ct. 423; *Union Trust Co. v. Jones*, 16 F. (2d) 236, 239. In its decree the Equity Court in this case retained jurisdiction only to adjudicate the validity of unpresented claims before determining their right to participate in the funds and resources of the city within its control. This in-

terpretation is borne out by the trial court's judgment on petitioner's intervention in the equity case.

Respondents are aware that there is no means of forcing a creditor to submit its claims for adjustment if it does not choose to do so, but this is without admitting that if it never so chooses it may not ultimately lose those claims when there is no other property out of which to satisfy them than that which is being administered by the court, nor is it admitting that when submitted such claims may not be adjusted in accordance with equitable principles already established by the court. It follows that as a member of the class for whom the benefits of the equity decree have been established, and there being, at this time, no other property or resources out of which petitioner's claims may be satisfied except in accordance with that decree, the petitioner must either take those benefits or receive nothing.

The fact that the equity decree was entered after its provisions had been acquiesced in by the city and those owning a large majority of the obligations affected does not lessen the binding effect of that decree on the members of the class dealt with. Nowhere has petitioner alleged or proven fraud or collusion in the procurement of the decree, and, as reflected by the record, the decree was entered only after a long period of litigation in which the issues involved were ably and seriously contested. In the case of *Ayer v. Kemper*, 48 F. (2d) 11 (Cert. den., 284 U. S. 639), it was held that an agreed judgment in a class action is binding upon all members of the class in the absence of a showing of fraud in its procurement. The question is further simplified by Rule 24c of the *Federal Rules*

of Civil Procedure, which provides "that a class action shall not be dismissed or compromised without the approval of the court." Here the court's approval was given and affirmed.

Petitioner contends that a bankruptcy court is the only court which has jurisdiction to force creditors to accept their pro rata share of the city's resources where same are insufficient to pay in full all creditors holding claims of equal dignity. In this we do not agree, for there is certainly nothing in the law which prohibits courts of equity from distributing the resources of an insolvent city according to equitable principles and thereafter protecting those who conform to the court's judgment from being penalized by their action. Petitioner refuses to accept this determination and asserts that the court is powerless to act in such situations.

Furthermore, contrary to petitioner's views, proceedings in municipal compositions were not available under the Bankruptcy Act at the time of the institution of the equity case. It was begun in March, 1936. The present bankruptcy laws did not become effective until August, 1937. The prior laws on the subject passed by the Congress on May 24, 1934, were held unconstitutional by the decision of this court in *Ashton v. Cameron Co. Water Imp. Dist. No. 1*, 298 U. S. 513, 56 S. Ct. 892 on May 25, 1936. An unconstitutional act is in legal contemplation as unoperative as though it had never been passed. *Norton v. Shelby Co.*, 118 U. S. 425, 442, 6 S. Ct. 1121, 1125; *Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett*, 228 U. S. 559, 566, 33 S. Ct. 581, 584. This rule is applicable here.

POINT 3

The record shows (R. 4) that upon the filing of the equity suit the court entered an order taking jurisdiction over the interest and sinking funds and tax resources of the city, and at the same time ordered notice to absent interested parties. The equity suit being brought to enforce equitable liens upon and claims to property within the district where the suit was brought, the notice ordered by the court was given in compliance with Section 118, Title 28, *U. S. Code*, being published for six consecutive weeks in a newspaper of general circulation in Ellis County, Texas, and in The Bond Buyer, a financial journal of general circulation throughout the country. Such notice was also mailed to all known holders of bonds and warrants of the city. The notice admonished all creditors to assert their rights in the city's resources and stipulated that upon final hearing the court would ascertain, adjudicate, distribute, and allocate the funds and taxing resources of the city among all such parties as the court would determine to be lawfully entitled thereto according to their respective rights (R. 5, 7). The notice having been ordered and having been published in accordance with the aforesaid section of the *Judicial Code*, all absent parties became concluded by the equity decree after one year from its entry.

In *Continental Trust Co. v. Shunk Plow Co.*, 263 F. 873 (Cert. den. 40 S. Ct. 45) the buyer of county warrants, having acquired an implied trust in the warrants which had been issued in lieu of warrants held by the plaintiff, was held to have a beneficial interest in the funds raised by the county to pay them, thus entitling the plaintiff to bring suit in the district in which the county was situated

and to serve notice by publication on non-resident defendants. The court there said:

> "The conclusion is that the averments of the bill show that, within the meaning of the provisions of Section 57 (118) of the judicial code, the appellant had an equitable claim to designated personal property within the district where the suit was brought. Non-residents who are proper parties defendant to such a suit, may be proceeded against in respect to the property in question in the mode and for the purpose indicated in that statute. Jellnick v. Huron Mining Company, 177 U. S. 1, 20 S. Ct. 559. The order made for service on, or notice by publication to, the non-resident defendants was in pursuance of the requirements of the statute, and that order was complied with. This being so the above mentioned action of the court (vacating an order for service by publication, quashing attempted service, and dismissing the bill for lack of jurisdiction) was erroneous" (parenthesis ours).

This court's decision in the case of *Leadville Coal Company v. Wm. McCreery, Trustee*, 141 U. S. 475, 12 S. Ct. 28, is also authority on the proposition that when the rights of all parties interested in property within the jurisdiction of the court has been determined by a decree, and if anyone of such parties after notice fails to assert his rights or to challenge the allowances then made by the court, his rights and challenges are lost; that he has had his day in court and is concluded by the final decree. In that case this court appropriately stated:

> "Indeed, we need not fail to observe that the main scope and purpose of this appeal seem to be to re-litigate questions fully determined by the final decree appealed from and affirmed."

Also respondents suggest that when petitioner voluntarily submitted its claims to the full jurisdiction of this

equity court, never questioning the court's jurisdiction in the equity case, but pleaded to the merits of its claims, it thereby waived any question of notice or jurisdiction over it. *Ferdig Oil Co. v. Wilson*, 91 F. (2d) 857.

POINT 4

Every party to as well as those who have since acquired an interest in the trial court's decree is a necessary and indispensable party in any action seeking to set aside or modify that decree. If they are not made parties the attack is collateral and cannot be maintained. *Avant v. Brown*, 91 S. W. (2d) 426, error dismissed. It has always been a uniform holding of the courts of Texas that as against a collateral attack the recitation of due service in the judgment proper is conclusive upon such matter and cannot be contradicted by other facts, whether appearing in the record or aliunde. *Switzer v. Smith* (Tex. Com. App.), 300 S. W. 31, 33, 68 A. L. R. 377.

The trial court and the Court of Appeals properly found that petitioner had failed to serve the parties in the equity case, either plaintiff or respondent, save and except the City of Ennis, and that even if it were appropriate to disturb the decree it could not be so disturbed without notice to all parties (R. 111, 128).

Many of the present holders of bonds of the City of Ennis have purchased and acquired their holdings in the market since the entry of the equity decree (R. 88). In doing so they must be considered to have relied upon the decree and the provisions therein specified for the support of their bonds and upon the approval of the Attorney General and market attorneys, given upon the strength of said decree

and its provisions for the support of the bonds. The holders of these bonds are numerous and scattered throughout the country, and the whereabouts of many of them are now unknown to the city. Many, if not all, of the present holders of the city's bonds were never parties to the equity suit. That these other creditors are necessary and indispensable parties to any action seeking to set aside, vacate or modify the decree, is supported by the rule stated in *34 C. J. 344, Sec. 557*, as follows:

> "As a general rule, all of the parties to a judgment should be made parties to a proceeding to vacate or open it, as well as those who may have acquired interest in the judgment or under it, and therefore have an interest in maintaining it."

See also: *City of Alvarado v. Christian*, 100 F. (2d) 156.

In the case of *Rubber Company v. Williams Auto Company*, 81 S. W. (2d) 255, it is held that a court which had rendered judgment against several defendants could not by subsequently setting aside the judgment as to one, leave that judgment in effect and final as to other defendants, since the legal effect of such action would be to set aside the judgment as to all.

CONCLUSION

When analyzed in the light of attendant circumstances, it is apparent that the petitioner has from the outset elected to ignore the rights of the remaining creditors of respondent city and to await financial betterments resulting from their concessions before asserting its claims for preference over them. Under the law and equities of the case this should not be permitted, and the courts below so held.

We submit that the Court of Appeals was right in affirming the district court's judgment upon the claims demanded by petitioner's intervention, and that this court should therefore refuse petitioner's application for writ of certiorari.

Respectfully submitted,

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